

OCT 31, 1986

SUBJECT: Final Notice of Decision to Deny the Petition
Submitted by Valley Watch, Inc. Regarding the
Control of a PCB Separation Facility under
RCRA---ACTION MEMORANDUM

FROM: J. Winston Porter
Assistant Administrator

TO: The Administrator

THRU: The Deputy Administrator

PURPOSE

This memorandum addresses the Agency's final decision to deny the petition submitted by Valley Watch, Inc. This petition requested that LPA control under Subtitle C of the Resource Conservation and Recovery Act (RCRA) the PCB separation facility located in Henderson, Kentucky and, if possible, halt construction and operation of the facility.

BACKGROUND

On February 24, 1986, EPA published its final decision in response to two rulemaking petitions submitted by the Citizens for Healthy Progress and Valley Watch, Inc. under section 21 of the Toxic Substances Control Act (TSCA) (15 U.S.C. 2620). Both petitioners requested that EPA exercise its authority under Section 5 (e) of TSCA to prevent the construction of a PCB separation facility in Henderson, Kentucky, pending the development of additional information regarding the health and environmental effects arising from the operation of the proposed facility. In that notice, however, EPA announced its final decision to deny this request of both petitioners for the following reasons: (1) EPA cannot amend TSCA, as requested by Citizens for Healthy Progress; and (2) EPA does not have the authority under section 5 (e) of TSCA to issue a proposed order to prevent construction of a proposed facility when a proposed process does not involve either a "new chemical substance" or a "significant new use" of a substance.

In that same notice, EPA also announced its tentative decision to deny Valley Watch's petition for rule making under section 7004 of RCRA. In their petition, Valley Watch requested that EPA regulate the Henderson facility under the hazardous waste regulations and, if possible, that EPA halt

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construction and operation of the facility. However, since Kentucky is an authorized State, we have no jurisdiction to issue such a rule, even if we were so inclined.

In addition, based on the information the Agency had, none of the wastes to be managed at the Henderson facility are currently identified or listed as hazardous under RCRA. As a result, Valley Watch's petition was tentatively denied.

TECHNICAL BASIS FOR DECISION

The decision to deny the petition is based on the Agency's determination that none of the wastes to be managed at the Henderson facility are currently identified or listed as hazardous under RCRA. No data was provided during the comment period to refute this conclusion. In addition, since the State of Kentucky has been authorized to operate the hazardous waste program in lieu of the EPA, Kentucky, not EPA, would have to issue a hazardous waste permit to the Henderson facility and interpret these wastes to be covered by the hazardous waste universe in Kentucky.

MAJOR ISSUES

None. Six comments were submitted on the tentative denial of the petition. We have carefully reviewed these comments and responded to them in the preamble to this final notice. We believe that the comments do not refute our decision to deny the petition and, therefore, we are making final our decision to deny Valley Watch's petition.

INTERMEDIA IMPACT OF ACTION

No adverse intermediate impact is expected as a result of this notice. The Henderson, Kentucky PCB facility will still be subject to the TSCA PCB regulations.

RESOURCE IMPACT

This notice will have no impact on EPA staff since no new facilities will be brought under the hazardous waste regulations.

REGULATORY IMPACT ANALYSIS

Under Executive Order 12291, EPA must determine whether a regulation is "major" and, therefore, subject to the requirements of a Regulatory Impact Analysis. This final notice is not a major rule since it does not change the existing regulations. Thus, it will not result in an effect on the economy

of \$100 million or more, not will it result in an increase in costs or prices to industry. There will also be no adverse impact on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, No regulatory Impact Analysis is being conducted.

REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. §601-613, whenever an Agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis which describes the impact of the rule on small entities (i.e., small businesses, small organizations, and small entities).

We have determined that this rule will have no adverse economic impact on small entities. Therefore, a regulatory flexibility analysis is not required. Accordingly, I recommend that you sign the attached certification.

RECOMMENDED ACTION

I recommend that you approve and sign the attached notice of denial.

Approved:

Disapproved:

Attachment: Final Notice to Deny Petition